

**ILLINOIS COMMERCE COMMISSION****Office of General Counsel**July 3, 2001 **RECEIVED**

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FCC MAIL ROOM

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-204B
Washington, D.C. 20554

RE: IN THE MATTER OF FEDERAL-STATE JOINT BOARD ON
UNIVERSAL SERVICE, CC Docket No. 96-45, Petition for
Reconsideration of the Illinois Commerce Commission

Dear Secretary Salas:

Enclosed please find the original and fourteen (14) copies of the Illinois Commerce Commission's Petition for Reconsideration in the above-referenced proceeding.

I would appreciate acknowledging receipt of the filing by returning a duplicate time stamped copy of this letter in the enclosed self addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "T. G. Aridas", written over a horizontal line.

Thomas G. Aridas
Special Assistant Attorney General
Illinois Commerce Commission

TAG/ed
Enclosure(s)

No. of Copies rec'd 0 + 14
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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of

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Federal-State Joint Board on
Universal Service

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CC Docket No. 96-45

PETITION FOR RECONSIDERATION
OF THE
ILLINOIS COMMERCE COMMISSION

Pursuant to Section 1.429 of the Commission's Rules of Practice and Procedure, 47 C.F.R. §1.429, the Illinois Commerce Commission ("ICC") hereby respectfully submits its Petition for Reconsideration of the Commission's Order issued on May 23, 2001, in the above-captioned proceeding.

BACKGROUND

On September 17, 1997, the Joint Board appointed a Rural Task Force ("RTF") to provide the Federal State Joint Board on Universal Service ("Joint Board") with a report that makes specific recommendations for the reformation of the Federal rural universal service support mechanism pursuant to the 1996 Telecommunications Act ("TA96" or "the Act").¹ The RTF submitted its recommendation to the Joint Board on September 29, 2000. The RTF recommended significantly increasing the size of the fund over a five-year period by adopting modifications to the Commission's current embedded cost mechanism for rural carriers. The

¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 00J-4 at ¶6 (rel. Dec. 22, 2000)("Recommended Decision").

recommended modifications are designed to increase the overall size of the fund by removing the effects of various caps previously placed on the fund, providing for an annual increase in the overall size of the fund, and expanding the fund to recover previously unsupportable costs.

After reviewing the Rural Task Force's proposal, the Joint Board submitted its recommendation to the Commission on December 22, 2000. The Joint Board echoed the RTF's recommendation to significantly increase the size of the fund over the next five years. Thereafter, in its Order² released on May 23, 2001, the Commission adopted the recommendation of the Joint Board.

The Commission's action significantly increases the size of the existing rural universal service fund by approximately \$1.26 billion over a five-year period. *Id.* at ¶29. The Commission took this action despite concerns raised by numerous parties, including the ICC, that a sufficient evidentiary record did not exist to support such an increase and that, to the extent the increase results in excessive funding, recipient carriers are likely to utilize the funds for other than the intended purposes. *See*, ICC Comments at 4-7. Specifically, the ICC noted that TA96 limits the size of the fund to a "sufficient" level, and mandates that support be used "only for the provisioning, maintenance and upgrading of facilities and services for which the support is intended." *Id.* at 4 (citing 47 U.S.C. §§254(b), (d), (e)). The ICC cautioned that a ruling that provides for excessive funding would violate the careful balance struck by Congress in these legislative provisions – the balance between certain parties' desires for support and the reality that others must supply the extensive monetary sums underlying such support. In addition to

² *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration & Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256 (rel. May 23, 2001) ("Order").

violating TA96, the ICC explained that creating an excess fund is inappropriate as a matter of policy because it will produce the following three harms: (1) the imposition of an unnecessary and unreasonable burden on all parties who contribute to the funding; (2) an unnecessary reduction in demand for other telecommunications services because the unnecessary monetary burden placed on consumers to support the fund increases the cost to consumers of obtaining all telecommunications services; and (3) the ability of recipients to use the excess funds for other than the intended purposes – for example, to offset inefficient operations or increase corporate salaries.

The Commission acknowledged these concerns as raised by the ICC and other parties. However, the Commission also noted that parties supporting an increase in funding levels, i.e., the likely recipients of the funds, argued to the contrary that the existing funding levels did not produce even sufficient support. Further, the Commission recognized that the evidentiary record did not support any resolution of this debate. *Id.* at ¶¶27 (stating that “neither side of the debate has proffered specific evidence supporting their positions”). Rather than requiring the presentation of sufficient evidence to support a resolution of the debate, the Commission simply rejected the ICC’s concerns and increased the fund. *See, Id.* at ¶¶27-29. In particular, as noted above, the Commission ordered an increase to the pre-existing large monetary fund of an additional \$1.26 billion. As the only response to the ICC’s concerns that carriers are likely to use excessive funding for unsupported activity, the Commission ordered that states be made responsible for overseeing and accounting for recipient carriers’ proper use of the funds.³

The ICC respectfully requests that the Commission (1) rehear its May 23, 2001, decision to adopt the RTF proposal after a complete and thorough evidentiary record has been developed,

and (2) require that evidence of carrier need for support be provided upfront rather than requiring states to subsequently act as an enforcement arm for a federal fund.

SUMMARY OF ICC POSITION

The ICC has a significant interest in this proceeding because, as a net contributor state, Illinois ratepayers are unfairly burdened as a result of the existence of an excessive fund. While the ICC supports the establishment of a “sufficient” universal service fund, the Commission’s decision to increase the fund by \$1.26 billion is not based on a sufficient and well-developed evidentiary record. Further, the ICC maintains that the establishment of a universal service support fund that collects contributions from contributing carriers in excess of the amount necessary for supported carriers to provide, maintain and upgrade facilities and services for which the support is intended is contrary to the purpose and plain language of section 254 of TA96. Moreover, the establishment of an excessive universal service fund constitutes bad public policy. Finally, the ICC considers the Commission’s state certification remedy for ensuring carriers are using support in a manner consistent with section 254(e) to be a non-workable solution to the underlying problems posed by excessive funding

³ Order at ¶¶ 186-194.

ARGUMENT

I. THE COMMISSION'S ORDER IS BASED UPON AN INSUFFICIENT AND UNDERDEVELOPED EVIDENTIARY RECORD.

It is well established that the Commission must base its orders on evidence which “substantially supports” its findings. Rulings of the Federal Communications Commission are subject to review by the Court of Appeals to extent that those courts may determine whether such rulings are supported by *substantial* evidence. *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 US 358, 99 L. Ed. 1147, 75 S. Ct. (1955)(emphasis added). The United States Court of Appeals for District of Columbia, when reviewing orders of the Commission, may not pass upon the weight of the evidence as to its accuracy and credibility, but must determine whether it substantially supports its findings. *Saginaw Broadcasting Co. v. Federal Communications Commission*, 68 App DC 282, 96 F2d 554, cert den 305 US 613, 83 L. Ed. 391, 59 S. Ct. 72 (1938).

Here, the Commission's Order clearly rests on an insufficient evidentiary basis. The RTF recommendation adopted by the Commission fails to sufficiently demonstrate that the proposed reforms will not produce excessive federal rural universal service funding. While the Commission's Order is largely based on the RTF's Recommendation, neither the RTF nor any party supporting the RTF's proposed funding increases performed detailed analyses of the need for support in any area where the RTF recommended increasing the fund. In other words, the parties supporting funding increases offered no empirical evidence to support their case. As a result, those parties failed to show that the modified rural universal support mechanism would provide a sufficient amount, and only a sufficient amount, of support.

Moreover, as mentioned *supra*, the Commission itself recognized the insufficiency of the evidentiary record in this proceeding. In its Order, the Commission found that: “neither side of the debate has proffered specific evidence supporting their positions.” *Id.* at ¶27. Rather than requiring the presentation of sufficient evidence to support a resolution of the debate, the Commission simply rejected the ICC’s concerns regarding the dangers of excessive funding as framed in its Initial Comments and increased the fund by approximately \$1.26 billion over a five-year period. Under the circumstances, the Commission was obligated to require the parties to develop a more comprehensive evidentiary record. Instead, the Commission elected not to do so and simply adopted the RTF’s Recommendation with minor modifications.

The Commission, therefore, should adhere to its statutory obligation to base its orders on a well-developed and thorough evidentiary record. The Commission has not done so in this case. Accordingly, the ICC requests that the Commission revisit this issue and require that a sufficient evidentiary record be provided to support any Commission finding that the increased funding is necessary to produce a “sufficient” (as opposed to excessive) Federal rural universal service support mechanism. In the absence of such a finding, it is likely that the funds will be used inefficiently and inappropriately, at significant costs to consumers. Only by requiring this factual showing will the Commission ensure that the Federal rural universal service fund provides recipient carriers with the proper incentives and is utilized in a manner consistent with Congressional intent.

II. THE COMMISSION SHOULD RECONSIDER ITS DECISION TO ADOPT THE RTF'S RECOMMENDATION BECAUSE AN EXCESSIVE FUND VIOLATES THE FEDERAL ACT AND IS INNAPROPRIATE AS A MATTER OF POLICY.

As explained above, the Commission's decision to increase the universal service fund is based on an insufficient and underdeveloped record, which makes it likely that those increases will result in an excessive fund. Such a result both violates federal law and is wrong as a matter of policy.

Section 254 of TA96 requires the Commission to adopt a Federal universal service support mechanism that is designed to provide a level of funding that is "sufficient" to achieve this purpose.⁴ Previously, when interpreting section 254's sufficiency requirement and while recognizing that the term "sufficient" requires that any funding mechanism produce enough support to achieve the purposes of section 254, the Commission held that support is "not to be any larger than is necessary to achieve the various goals of section 254."⁵ The purpose of section 254's requirement to have only a sufficient and non-excessive fund is to ensure that recipient carriers utilize the fund "only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."⁶

The requirement that universal service funding be sufficient and not excessive is a position that has been upheld by the courts. *See, Alenco Communications, Inc. v. FCC*, 201 F.2d 608 (5th Cir. 2000). Specifically, as the Commission's Order acknowledges, the court in *Alenco* clarified the level of funding that constitutes "sufficient" for purposes of TA96. *See, Order at* ¶28 (citing the *Alenco* decision). In *Alenco*, the United States Court of Appeals rejected an attempt by rural telephone companies to force an increase in federal universal service by

⁴ *See, Id.* at §254(b), (d), (e).

⁵ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306 at ¶59 (rel. Nov. 2, 1999)("Ninth Report and Order").

removing the cap on high-cost loop support and providing for the recovery of corporate operations expenses. 201 F.2d at 619. The rationale advanced by the companies to support their requested increases was that the fund would not satisfy the Act's sufficiency requirement without the increases. The court rejected the carriers' argument that the existing fund was insufficient, and clarified that "excessive funding may itself violate the sufficiency requirements of the Act." *Id.* The court further pointed out that "[b]ecause universal service is funded by a general pool subsidized by all telecommunications providers – and thus indirectly by customers – excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some customers out of the market." *Id.*

Despite the Commission's recognition of the appellate court's interpretation of the relevant statutory provisions, the Commission adopted modifications to the rural universal service fund in its Order that are very likely to create a fund that will be excessive in size. The Telecommunications Act of 1996 states that federal universal service "support should be explicit and sufficient to achieve the purposes of this section."⁷ As the Commission itself observed in its order, adopting a forward-looking support mechanism for non-rural company study areas, "the primary role of federal high-cost support is to enable reasonable comparability of rates among states."⁸ The Commission has also previously re-affirmed its commitment "to the objective that the fund not be any larger than is necessary to achieve the various goals of section 254."⁹

⁶ 47 U.S.C. §254(e)(emphasis added).

⁷ Telecommunications Act of 1996, Section 254(e).

⁸ CC Docket 96-45, NINTH REPORT & ORDER AND EIGHTEENTH ORDER ON RECONSIDERATION (Ninth Report and Order), Adopted: October 21, 1999, Released: November 2, 1999, at ¶ 7.

⁹ Ninth Report and Order at ¶ 59.

In addition, an excessive fund makes for bad public policy for the following three reasons. First, funding in excess of that required to fulfill the purposes of section 254 would unnecessarily and unreasonably increase the burden on all contributors to Federal universal service funding mechanisms. Second, the imposition of such an unnecessary monetary burden on fund contributors “would also unnecessarily reduce the demand for other telecommunications services” because the monetary burden would increase the cost to consumers of obtaining all telecommunications services. Third, excessive funding “would enable the carriers providing the supported services to use the excess to offset inefficient operations and for purposes other than ‘the provision, maintenance, and upgrading of facilities and services for which the support is intended.’” In fact the Commission recognized in its First Report and Order on Universal Service¹⁰ that excessive funding indeed results in the aforementioned harms, thereby creating bad public policy.

III. THE FCC’S IMPOSED STATE CERTIFICATION REMEDY IS AN UNWORKABLE SOLUTION AND DOES NOT ADDRESS THE UNDERLYING PROBLEM OF EXCESSIVE FUNDING.

In its Initial Comments, the ICC argued that excessive funding could lead carriers to utilize funds in an inefficient and inappropriate manner at significant costs to consumers. Specifically, providing excess funding is likely to give those carriers receiving the funds the incentive to engage in inefficient behavior and to use the funds for purposes other than those intended by Congress. In addition, no part of the RTF proposal adopted by the Commission ties carriers’ receipt of the excess funds to the carriers’ appropriate use of the funds. Accordingly,

¹⁰ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report & Order, FCC 97-157 at ¶225 (rel. May 8, 1997)(“First Report & Order”).

recipient carriers are likely to utilize the funds to support any number of alternative activities, such as increased salaries or corporate expenses.

In its Order, the Commission acknowledged the importance of determining whether support is used consistently with section 254(e) and attempted to remedy the problems that the ICC cautioned are likely to result from establishing an excessive fund with a state certification process. Specifically, the Commission ordered that “states should be required to file annual certifications with the Commission to ensure that carriers use universal service support ‘only for the provision, maintenance and upgrading of facilities and services for which the support is intended’ consistent with section 254(e).”¹¹ The Commission further explained its rationale as follows: “Given that states generally have primary authority over carriers’ intrastate activities, we believe that the state certification process provides the most reliable means of determining whether carriers are using support in a manner consistent with Section 254(e).”¹² The ICC is concerned with the Commission’s proposed remedy for two reasons.

First, the Commission’s stated remedy of requiring states to file annual certifications with the Commission to ensure that carriers are using universal service support consistent with section 254(e) essentially places states in the position of serving as an enforcement arm of the Commission. As a policy matter, this requirement places an onerous burden on states. Not only are states put in the position of having to enforce federal law, but they are additionally required to make certain representations on behalf of third parties (ie. the rural carriers). This results in a significant drain on states’ limited resources.

Second, the state certification process outlined by the Commission is likely to lead to inconsistent results between states. As the Commission acknowledged in its Order, some state

commissions may have only limited regulatory oversight to ensure that federal support is reflected in intrastate rates.¹³ Accordingly, the Commission determined that in states in which the state commission has limited jurisdiction over such carriers, “the state need not initiate the certification process itself.”¹⁴ In addition, even in those states with jurisdiction to oversee rural carriers’ use of federal universal service funds, the process employed by states to do so is likely to vary significantly. For instance, some states may dedicate significant resources to perform reasonable audits and arrive at accurate results while other states, due to a lack of resources, are likely to simply serve as “rubber stamps” to documents prepared by the rural carriers themselves. In the latter instance, the states will simply be middlemen in a process ordered by the federal government.

In short, the state certification obligation imposed by the Commission on the states is likely to be an ineffective mechanism for mitigating abuses by carriers choosing to use support in a manner inconsistent with Section 254(e). Instead of charging individual states with the responsibility to police carriers after they have received excessive funding, the Commission should take the initial step of ensuring that the fund is sufficient but not excessive. Accordingly, the ICC respectfully requests that the Commission rehear its decision to require states to certify rural carriers’ use of federal universal service funds.

¹¹ Order at ¶ 188.

¹² *Id.*

¹³ Order at ¶ 189.

¹⁴ Order at ¶189 (the Commission did not explain what constitutes “limited jurisdiction” in such instances).

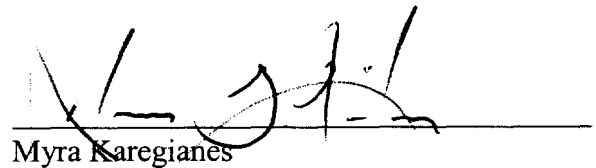
CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission rehear its May 10, 2001, decision to adopt the recommendations of the Rural Task Force and Federal-State Joint Board on Universal Service for reform of the Federal rural universal service support mechanism, and for any and all other appropriate relief.

July 03, 2001

Respectfully submitted,

ILLINOIS COMMERCE COMMISSION

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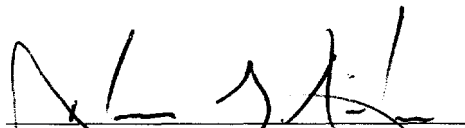
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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served in accordance with the Commission's Rules of Practice and Procedure Section 1.429(e).

Dated at Chicago, Illinois, this 3rd day of July, 2001.

A handwritten signature in black ink, appearing to read 'T. G. Aridas', written over a horizontal line.

Thomas G. Aridas
Special Assistant Attorney General
Illinois Commerce Commission